(31)

Office - Supreme Court, U.
FILED
JAN 9 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 709

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY, OF LOUISVILLE,

Petitioner,

v.

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF THE RECEIVER

FRANK E. WOOD,
ROBERT S. MARX,
HARRY KAGAN,
Attorneys for Petitioner.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 709

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY, OF LOUISVILLE,

Petitioner,

v.

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF THE RECEIVER

Respondent's brief does not deny that the first three of the questions presented are of far-reaching concern and importance involving, as they do, the effect of control of corporate bodies, committees and officials by individuals. Nor could denial be made of the importance of this problem in view of the numerous times that the questions have come up for consideration in congressional committees and in writings on the subject. Nor does respondent deny that the questions as stated by petitioner present a conflict

between the decision of the Sixth Circuit Court of Appeals and the Second Circuit Court of Appeals. It is contended, however, that the questions as stated are "fictitious" and depend upon facts not found by the lower court.

In this contention our opponents give an unfair and incorrect statement of the status of the record. The questions of fact which were presented to the lower courts were: (1) Was there a contemporaneous agreement restricting the certificates when originally issued? (2) Was there an agreement on the part of Caldwell on behalf of Missouri Life with respect to the certificates when they were issued to Missouri State Life? (3) Did Caldwell control and dominate Missouri State Life? With respect to the first two questions of fact both the District Court and the Court of Appeals agreed that there was a restrictive agreement and that Caldwell made an agreement on behalf of Missouri Life. With respect to question three the District Court and the Court of Appeals disagreed. The District Court made a finding that the officers and directors of Missouri State Life were "independent" of Caldwell and "did not surrender their powers to Rogers Caldwell." (Finding of Fact No. 21, R. 1, p. 137.) However, when the case came to the Court of Appeals after trial on the merits, that court specifically stated that with respect to this finding of fact the District Court was in error and that the same was clearly erroneous. It stated that it was adopting the findings of the District Court except "wherein we have specifically indicated to the contrary" in the narrative of the facts. [141 F. (2d) 898, 904, Col. 2, R. 1, p. 173.] On the question of control the court specifically indicated that it did not consider the finding of the District Court correct. With respect to this finding it said:

> "But we think, from reading the record, that it is overstatement to say that the directors and corporate officers acted with complete independence in their offi-

cial capacities." 141 F. (2d) 898, 903, Col. 2, R. 1, p. 170.

Having disapproved of the finding the Court of Appeals arrived at its own conclusion on the question of control. It found:

> "THE OFFICERS AND EXECUTIVE COMMITTEE MEMBERS . . . APPEARED TO HAVE BEEN COMPLAISANT IN SUBMISSION TO HIS (Caldwell's) DESIRES IN THE CONDUCT OF THE CORPORATE BUSINESS." 141 F. (2d) 898, 903, Col. 2, R. 1, p. 171. (Emphasis ours.)

and

> "HILLSMAN TAYLOR, PRESIDENT OF THE COMPANY, . . . WAS PLAINLY DOMINATED BY HIM (Rogers Caldwell)." 141 F. (2d) 898, 902, Col. 2, R. 1, p. 168. (Emphasis ours.)

and

> ". . . THE OFFICIAL FUNCTIONING OF THE BOARD WAS FAR FROM FREE AND UNTRAMMELLED TO THE POINT OF INDEPENDENCE. . . ." 141 F. (2d) 898, 903, Col. 2, R. 1, p. 171. (Emphasis ours.)

Thus we have the facts of control established by the Court of Appeals and it is no answer to the Receiver's petition for writ of certiorari to say that a question of fact is presented; that the facts are fictitious, or that there is a lengthy record. It is true that the record is voluminous, but the Receiver undertook to show by a large number of transactions that the corporate will of Missouri Life was surrendered to Caldwell. Neither the District Court nor the Court of Appeals in their consideration of the case on the merits chose to review these specific transactions, but confined themselves to discussion of the ultimate facts of control and with respect to those ultimate facts the Court

of Appeals found that Caldwell controlled the officers, the executive committee and the board of directors.[1]

The respondent unfairly states that the quotations from Judge Simons' opinion which appear in the petition for writ of certiorari are merely statements based on an opening statement which was never proved at time of trial on the merits. This is incorrect. It was the District Judge after trial on the merits who quoted Judge Simons and made the statement that

> "The manifestation of his (Caldwell's) genius and the ultimate end to which it came are best described in the words of Judge Simons. . . ." 46 F. Supp. 189, 191, R. 1, p. 107.

The District Court then quotes Judge Simons' statement of the facts of control by Caldwell of numerous corporations, and of the improper practices indulged in by him in connection with such control.

Respondent refers to finding of fact 22 which was copied verbatim by the District Court along with the other suggested findings of fact proposed by respondent.[2] A finding that the Receiver did not prove his opening statement is not a finding of fact.

---

[1] The Court of Appeals in its consideration of the case on the merits did refer to one of the specific transactions, namely, the Inter-Southern deal, and said: "Undoubtedly, the committee was highly culpable in its neglect of duty in permitting the unloading of Inter-Southern Insurance Company securities on the Missouri State Life Insurance Company, for the benefit of Caldwell and Company and to the heavy financial detriment of Missouri State Life." The officers and executive committee participated in this transaction and it was formally approved by the Board of Directors (Ex. 45, Minutes of Directors, p. 145, Reproduced p. 69, approving Minutes Executive Committee of May 22, 1930—Ex. 50, p. 135, Reproduced p. 81) although the minutes which the Board of Directors approved showed on their face that the directors were approving on behalf of an insurance company purchase of mortgages of which $1,038,425.76 were in default (R. 2, p. 354, R. 3, pp. 816, 864) and payment at par for bonds which were selling for 30 cents to 80 cents of their face value. (R. 2, pp. 488, 490.)

[2] Compare Insurance Company suggested finding, R. 3, p. 1243, copied verbatim by court, R. 1, p. 138.

> "Saying that the plaintiff has sustained the burden of proof as to the designated issue in suit No. 3371, is not an adequate finding of the matters of fact involved in that issue, particularly where, as here, the subject is new and may admit of different opinions. It is in the nature of a legal conclusion rather than a finding of the underlying facts, and we think it does not adequately respond to the issue and is not sufficient to support the judgment which rests on it." *United States* v. *Jefferson Electric Company*, 291 U. S. 386, 408.

Nor can it be said that the Receiver did not establish the allegations of his answer or opening statement when the Court of Appeals has found existence of control and domination by Rogers Caldwell.

REPLY TO DISCUSSION OF INTEREST QUESTION

With respect to the two questions regarding interest respondent alleges that as to question number four, the same is "fictitious" (Respondent's brief, p. 13). It is contended that the question erroneously "recites" that the Circuit Court of Appeals on the first appeal

> ". . . established the law of the case . . . that no interest shall be allowed."

In respondent's contention that this was not so, the claim is made that the first decision

> ". . . related only to the Receiver's liability for interest after the date of the bank's receivership."

Respondent fails to advise this court that the judgment on the first appeal provided for payment of "interest on such dividends." (R. 1, p. 71.) It was from this judgment that assignments of error were taken and which was reversed

by the Court of Appeals on its first hearing pursuant to its decision holding that interest was not due on the delayed dividends. This established the law of the case. Nothing remained to be done with respect to this issue after the first decision by the Court of Appeals. The Insurance Company failed to ask this court for a review and the decision on interest became final.

With respect to the final question, it is conceded that the same arises on the record, but it is contended that it does not call for certiorari. Neither *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, nor *Armstrong* v. *American Exchange National Bank*, 133 U. S. 433, apply to the situation. The first applies solely to a case where there is sufficient collateral to pay a secured claim with interest. The second does not involve a case of two appeals and a final decision holding that interest cannot be recovered as is the case here.

CONCLUSION

Since the respondent predicates its entire opposition to the petition for writ of certiorari on the theory that the facts do not present the question, and since the facts found by the Circuit Court of Appeals in its discussion on the merits do present the question of control, and inasmuch as respondent does not deny that on the basis of those facts the matter presented is of far-reaching concern and importance and presents a conflict between two circuit courts of appeal, it is submitted that the petition for writ of certiorari should be granted.

FRANK E. WOOD,
ROBERT S. MARX,
HARRY KASFIR,
Attorneys for Petitioner.